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NO. _____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1983

STATE OF ALABAMA, PETITIONER

VS.

EARNEST JAMES STURDIVANT, RESPONDENT

PETITION FOR A WRIT OF
CERTIORARI TO THE SUPREME COURT AND
COURT OF CRIMINAL APPEALS OF ALABAMA

OF

CHARLES A. GRADDICK
ATTORNEY GENERAL

GERRILYN V. GRANT
ASSISTANT ATTORNEY GENERAL

JOSEPH G. L. MARSTON, III
ASSISTANT ATTORNEY GENERAL

ATTORNEYS FOR PETITIONER

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QUESTIONS PRESENTED

1. Does the rule of Strickland v. Washington (___ U.S. ___, 80 L.Ed.2d 674, 104 S.Ct. ___ [1984]) apply to the effective assistance of counsel on appeal?

2. Does an attorney deprive his client of effective assistance of counsel on appeal when, as a result of his understanding of the client's intentions, the attorney does not appeal his client's conviction?

3. Is an attorney shown to have deprived his client of effective assistance of counsel on appeal in not appealing the client's conviction, where the undisputed evidence is that such an appeal would have been frivolous?

THE PARTIES

In the Circuit Court of Dallas County, Alabama, the Court of Criminal Appeals of Alabama and the Supreme Court of Alabama, the parties were: The State of Alabama, who is the Petitioner herein and Earnest James Sturdivant, who is Respondent herein.

The matters at issue here were first raised in the Circuit Court of Dallas County, Alabama, by Respondent's petition for a writ of error coram nobis and have been at issue throughout these proceedings.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	ante,I
THE PARTIES	ante,II
TABLE OF CONSTITUTIONAL PROVISIONS	iii
TABLE OF CASES	iii
TABLE OF STATUTES	vi
OPINIONS BELOW	1
JURISDICTION	3
CONSTITUTIONAL PROVISION INVOLVED	3
STATEMENT OF THE CASE	4
STATEMENT OF THE FACTS	11
SUMMARY OF THE ARGUMENT	17
ARGUMENT	21
REASON FOR GRANTING THE WRIT: CONFLICT WITH THIS HONORABLE COURT'S DECISION IN *STRICKLAND V. WASHINGTON*	21
A. APPLICABILITY OF *STRICKLAND V. WASHINGTON*	21

TABLE OF CONTENTS CONT'D

PAGE

B. COUNSEL'S PERFORMANCE WAS NOT DEFICIENT..... 31

C. THE ATTORNEY'S OMISSION DID NOT PREJUDICE THE RESPONDENT..... 42

CONCLUSION..... 46

CERTIFICATE OF SERVICE..... 49

TABLE OF CONSTITUTIONAL PROVISIONS

PAGE

United States Constitution,

Amendment Six..... 22, 25-27

Amendment Fourteen..... 4,22

TABLE OF CASES

PAGE

Alabama v. Gamble,
509 F.2d 95
(5th Cir., 1975)..... 40

Alston v. State,
___ So.2d ___
(Cr.app.Ala.,
June 12, 1984)..... 38

Anders v. California,
386 U.S. 738,
18 L.Ed.2d 493,
87 S.Ct. 1396 (1967)..... 3,7, 19,21, 26,30, 36,37, 45

Chaffin v. Stenchcomb,
412 U.S. 17,
36 L.Ed.2d 714,
93 S.Ct. 1977 (1973)..... 39

Clark v. Alabama,
423 U.S. 937,
46 L.Ed.2d 270,
96 S.Ct. 298 (1975)..... 38

TABLE OF CASES CONT'D

	PAGE
Clark v. State, 294 Ala. 485, 318 So.2d 805 (1974).....	38
Estelle v. Dorrough, 420 U.S. 534, 43 L.Ed.2d 377, 95 S.Ct. 1173 (1974).....	24
Gamble v. Alabama, 423 U.S. 924, 46 L.Ed.2d 250, 96 S.Ct. 267 (1975).....	40
Griffin v. California, 380 U.S. 609, 14 L.Ed.2d 106, 85 S.Ct. 122 (1965).....	45
Hicks v. State, 437 So.2d 1346 (S.Ct. Ala., 1983).....	25
Hicks v. State, 437 So.2d 1344 (Cr.App.Ala., 1982).....	25
Jones v. Barnes, ___ U.S. ___, 77 L.Ed.2d 987, 103 S.Ct. ___ (1983).....	19,20, 24,30, 33,37, 41
Longmire v. State, 443 So.2d 1265 (S.Ct. Ala., 1982).....	15,19, 35

TABLE OF CASES CONT'D

	PAGE
McKane v. Durston, 153 U.S. 684, 38 L.Ed. 867, 14 S.Ct. 913 (1894).....	20,41
Miliner v. State, 414 So.2d 133 (Cr.App.Ala., 1981).....	40
Ross v. Moffitt, 417 U.S. 600, 41 L.Ed.2d 341, 94 S.Ct. 2437 (1974).....	22
Santobello v. New York, 404 U.S. 257, 30 L.Ed.2d 427, 92 S.Ct. 495 (1971).....	38
Strickland v. Washington, ___ U.S. ___, 80 L.Ed.2d 674, 104 S.Ct. ___ (1984).....	10,17, 18,21, 22,27, 42,44, 46
Sturdivant v. State, ___ So.2d ___ (S.Ct. Ala., 1984).....	1,6
Sturdivant v. State, ___ So.2d ___ (Cr.App. Ala., 1983).....	1,6
Sturdivant v. State, ___ So.2d ___, (Cr.App.Ala., 1984).....	2,10

TABLE OF CASES CONT'D

PAGE

United States v. Ross,
456 U.S. 798,
72 L.Ed.2d 572,
102 S.Ct. 2127 (1982)..... 13

Wainwright v. Torna,
455 U.S. 586,
71 L.Ed.2d 475,
102 S.Ct. 1300 (1982)..... 24

Wasman v. United States,
___ U.S. ___,
___ L.Ed.2d ___,
___ S.Ct. ___,
52 U.S. L. Wk. 5063 (1984)... 39

TABLE OF STATUTES

PAGE

United States Code,

Title 28, Section 1257..... 3

OPINIONS BELOW

The orders without opinion of the Court of Criminal Appeals of Alabama affirming the denial of Respondent Sturdivant's petition for a writ of error coram nobis and denying rehearing are not as yet reported but will be reported as follows:

Sturdivant v. State, ___ So.2d ___ (Cr.App.Ala., 1983)

A copy of the certification of the same is submitted as Appendix "A" to this petition.

The opinion of the Supreme Court of Alabama reversing the Court of Criminal Appeals' decision and orders in this case is not as yet reported but will be reported as follows:

Ex parte: Sturdivant, In re: Sturdivant v. State, ___ So.2d ___ (S.Ct. Ala., 1984)

A copy of the same is submitted as Appendix "B" to this petition.

The order of the Alabama Supreme Court denying rehearing but modifying its opinion is not as yet reported but will be reported as follows:

Ex parte: Sturdivant; In Re: Sturdivant v. State, ___ So.2d ___ (S.Ct. Ala., 1984)

A copy of the same is submitted as Appendix "C" to this Petition.

The order and opinion of the Court of Criminal Appeals of Alabama conforming its decision to that of the Alabama Supreme Court is not as yet reported but will be reported as follows:

Sturdivant v. State, ___ So.2d ___ (Cr.App.Ala., 1984)

A copy of the same is submitted as Appendix "D" to this petition.

JURISDICTION

The order of the Supreme Court of Alabama denying rehearing in this case was issued on July 6, 1984, (Appendix "C", page 12) and this petition is filed within sixty days of that date.

The Jurisdiction of this Honorable Court is invoked under 28 United States Code, Section 1257.

CONSTITUTIONAL PROVISIONS INVOVLED

The Alabama Supreme Court decided this case under Anders v. California (386 U.S. 738 [1967]), wherein this Honorable Court construed section one of the Fourteenth Amendment to the Constitution of the United States, which reads as follows:

> "...All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the state wherein they reside. No state

shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny any person within its jurisdiction the equal protection to the laws...."

STATEMENT OF THE CASE

On May 17, 1983, the Respondent, Ernest J. Sturdivant, filed a petition for a writ of error coram nobis in the Circuit Court of Dallas County, Alabama, seeking a new trial.[1] The grounds alleged in the petition were as follows:

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1. The records of the Circuit Court of Dallas County show, the Alabama Supreme Court found (Appendix "B", page 3), and it is undisputed that on May 5, 1982, the Respondent was convicted of robbery in the second degree and sentenced to twenty years imprisonment.

1. His lawyer did not appeal his conviction,[2] no suggestion was made that there was any error to appeal.

2. He had an alibi witness.

3. His attorney refused to subpeona the alibi witness.

4. No pre-sentence report was made on his case.

5. He was denied Youthful Offender treatment.

6. He did not receive a transcript of the trial.

7. Although the Court granted a motion to suppress, the Respondent's attorney did not object to the introduction of evidence found in a search.

On the basis of these allegations he

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2. Literally: "...I was treated not to appeal as lawyer refused to fully investigate all areas of defense and to insert them in a timely and proper manner: Reece vs. Georgia, 100 L.Ed. 1955...." (R. p. 4)

prayed for either a new trial or a sentence reduction. (R.pp. 1-7)

New counsel was appointed for the Respondent, and a hearing was held on August 5, 1983. Following the hearing, the Court entered an order finding that the Respondent had not been deprived of the effective assistance of counsel and denying the writ. (R.p. 9)

Appeal was taken to the Court of Criminal Appeals of Alabama, which on November 29, 1983, affirmed the Circuit Court's judgment without opinion and, on January 10, 1984, denied rehearing also without opinion. (Sturdivant v. State, ___ So.2d ___ (Cr.App.Ala.,Nov. 29, 1983); Appendix "A", Pages 1-2).

The Supreme Court of Alabama granted Respondent Sturdivant a writ of certiorari. On May 11, 1984, the Alabama Supreme Court reversed the decision of

the Court of Criminal Appeals. The Alabama Supreme Court held that the Respondent's Attorney's not appealing the Respondent's conviction, even though it was based on his understanding of his client's intentions, constituted ineffective assistance of counsel. The Alabama Supreme Court ruled that under Anders v. California (386 U.S. 738 [1967]) the Respondent had been denied the effective assistance of counsel on appeal. The Court wrote in part:

> "In the case at bar, the requirements of Anders were not followed. Sturdivant's statement that he would "go and build his time" did not necessarily mean that he did not wish to contemporaneously proceed with the appeal; thus his counsel was not relieved of his duty to either appeal the conviction or to withdraw from the case after following the guidelines of Anders. Due to this inadvertent failure, Sturdivant was denied the procedure set forth in Anders

> and, therefore, the trial court should have granted Sturdivant's petition. It also follows that the Court of Criminal Appeals erred in affirming that denial...." (Appendix "B", pages 10-11)

The cause was remanded to the Court of Criminal Appeals "...with directions to allow petitioner [Sturdivant] an out of time appeal...."[3]. (Sturdivant v. State, ___ So.2d ___ (S.Ct.Ala., May 11, 1984); Appendix "B", page 11)

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3. The Alabama Supreme Court also wrote:

> "...[The Attorney] advised his client that, if he should succeed on appeal, he would probably be retried and could possibly be convicted of the more serious offense of robbery in the first degree...." (Appendix "B", page 5; emphasis supplied).

On rehearing both parties protested that nothing in the record supported or even suggested the underlined language in this passage. On rehearing the Alabama Supreme Court modified this passage to read. (Continued)

The State of Alabama applied for rehearing protesting the language discussed in footnote 3 above. More importantly, the State pointed out that the Court had reversed the traditional policy of placing the question of appeal in the convicted defendant and in effect placed on the lawyer the duty to appeal unless his client gave unequivocal contrary instructions. The State pointed out that in some cases success on appeal could in the long run work to the detriment of a convicted defendant. In

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Footnote 3 continued:

> "...[The Attorney] also advised his client to the effect that, if he should succeed on appeal, he would probably be retried and could possibly be convicted of the more serious offense of robbery in the first degree...." (Appendix "C", page 15; emphasis supplied).

This is likewise unsupported by the record. See Appendix "E", page 21.

addition, the State pointed out that the unconflicting evidence was that an appeal would have been frivolous and that the Respondent was, therefore, not prejudiced. Strickland v. Washington (___ U.S. ___, 80 L.Ed.2d 674, 104 S.Ct. ___ [1984]) was specifically called to the Court's attention.[4] On July 6, 1984, the Alabama Supreme Court denied rehearing but modified its opinion slightly. See footnote 3, above.

On August 14, 1984, the Court of Criminal Appeals of Alabama conformed to the Alabama Supreme Court's decision and opinion. (Sturdivant v. State, ___ So.2d ___ [Cr.App.Ala., August 14, 1984]; Appendix "D", page 17).

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4. The Alabama Supreme Court issued its original opinion in this case on May 11, 1984. Strickland was issued May 14, 1984. At the time of the State's application for rehearing, counsel knew of Strickland from news reports but did not have access to the text of the opinion.

STATEMENT OF THE FACTS

Only the facts relating to the Respondent's claim of denial of effective counsel on appeal are directly relevent in this proceeding. However, the facts relating to the other claims in his original petition are useful in putting the relevent claim in context.

Honorable Edward W. Green, Jr., Attorney at Law, was originally appointed to represent the Respondent, but, when Mr. Green accepted an appointment as Chief Deputy District Attorney, Honorable Robert Blair, Attorney at Law, was appointed in Mr. Green's stead. (Tr. pp. 2,16-17 and 24)

The Respondent's alleged alibi witness was an individual who was with the Respondent on the day of the robbery from 7:00 a.m. until 3:00 p.m. (Tr. pp.

3-5) Both of his attorneys told the Respondent that, since the robbery occured at 7:00 or 8:00 p.m., this witness would provide no alibi for the time of the crime. (Tr. pp. 4 and 6-8) The Respondent insisted that the witness would provide an alibi, because when the Respondent and the witness separated at 3:00 p.m., the Respondent told the witness that he planned to go to Birmingham. (Tr. pp. 4-5 and 7-8) The lawyers told the Respondent that he needed to identify some of the people he claimed could place him in Birmingham at the time of the robbery. (Tr. pp. 8-10 and 22-23) To this end, the attorneys obtained the release the Respondent's automobile from impoundment. (Tr. pp. 8-9 and 22) But, the Respondent never did go to Birmingham. (Tr. pp. 9-10)

A pre-sentence-youthful offender report was ordered by the Court and filed by the Board of Pardons and Paroles prior to trial. (R.pp. 10-13 and Tr. pp. 13-14) The Respondent recalled attending his Youthful Offender hearing. (Tr. pp. 14-15)

No evidence was presented relative to the trial transcript.

The Respondent's attorneys filed a motion to suppress the pistol used in the robbery, which was found in the Respondent's automobile incident to his arrest about an hour after the robbery.[5] (Tr. pp. 2-3, 17, 24-25) A pre-trial

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5. This record is devoid of any evidence relating to the crime, the arrest, the search or the seizure, except for the pre-sentence-youthful offender report. (R.p. 11) This seems to suggest a legal search. See United States v. Ross, 456 U.S. 798, 72 L.Ed.2d 572, 102 S.Ct. 2127 (1982). The record does not suggest why this search was thought to be illegal.

hearing was held on the motion, but, since there was difficulty in getting witnesses to this hearing, the Circuit Judge did not enter a ruling. However, based on what he heard at this hearing, His Honor apparently had doubts about the search and seizure, which he expressed to Mr. Green (Tr. p. 18 and 21). Naturally, Mr. Green mentioned this to the Respondent. (Tr. pp. 18) However, by the time of trial, the State was able to produce additional witnesses, including the Respondent's accomplice, and bear its burden of proving a legal search. Thus Mr. Blair's objections to the evidence were overruled. (Tr. pp. 10-12 and 26)

Turning to appeal, it was undisputed that shortly after the conviction, Mr. Blair visited the Respondent. (Tr. pp. 5-6 and 27) At this time, the Respondent

expressed an interest in appeal. (Tr. pp. 5-6, 10 and 15-16) Mr. Blair, while fully aware of his duty to appeal if the Respondent so desired,[6] counseled against appeal. Mr. Blair advised the Respondent that there was nothing in the record to argue on an appeal and that an appeal would be frivolous. (Tr. p. 28)[7] In the only real conflict in the evidence in this case, the Respondent testified that Mr. Blair told him that, if his conviction was reversed on appeal, he would be retried and could possibly get more time.[8] (Tr. pp. 15-16) Mr. Blair

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6. Longmire v. State, 443 So.2d 1265 (S.Ct. Ala., 1982).

7. This was Mr. Blair's usual advise to his clients in such frivolous cases. (Tr. p. 32).

8. It is possible that the Respondent confused Mr. Blair's statements concerning an appeal with his discussion of certain pending charges. See Appendix "E", pages 28-29.

testified that he told the Respondent that in the event of a reversal on appeal, the case would probably be retried with the same result as the first trial. (Tr. p. 28) Mr. Blair met with the Respondent and talked with his family many times. (Tr. pp. 12-13 and 31) During this time the Respondent, "...indicated to ...[Mr. Blair] different feelings at different time[s]...." (Tr. p. 27) with regard to appeal. Finally, the Respondent advised Mr. Blair that "...he would go and build his time and get it over with..."[9]. (Tr. p. 28) In the context of their conversations, Mr. Blair understood this to mean that the

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9. The Appellant's choice of words indicates that his main interest in appeal was that it might have put off the time for the commencement of his sentence.

Respondent had decided not to appeal. (Tr. p. 28) About a week later, after the time for appeal had run, the Respondent called Mr. Blair to the jail and told him that he wanted to appeal after all. Mr. Blair advised the Respondent that the time for appeal had run. (Tr. p. 28)

At no point was it ever suggested that there was anything to argue in an appeal by the Respondent. In fact, the only evidence on the subject was that an appeal would have been frivolous. (Tr. pp. 28 and 31)

SUMMARY OF THE ARGUMENT

In Strickland v. Washington (___ U.S. ___, 80 L.Ed.2d 674, 104 S.Ct. ___ [1984] this Honorable Court set the standards for the effective assistance of counsel at trial. Although there are

clear differences between trial and appeal, the differences are such that appellate advocacy which met the Strickland standards would necessarily be effective within the meaning of the Constitution. A determination of effective assistance of counsel under Strickland requires a two-fold determination: First, whether counsel made errors of such seriousness that he or she was not functioning "as counsel" and, second, whether there is a reasonable probability that, but for counsel's errors, there would have been a disposition more favorable to the accused. Judged by these standards the conduct of the Respondent's attorney in this case was neither deficient nor prejudicial.

In forming a professional judgment that an appeal would be frivolous, communicating his opinion to his client and counseling against appeal, the Respondent's attorney did exactly what would have been demanded of a retained attorney. Compare Jones v. Barnes, ___ U.S. ___, 77 L.Ed.2d 987, 103 S.Ct. ___ (1983). In light of Alabama law (e.g. Longmire v. State, 443 So.2d 1265 [S.Ct. Ala., 1982]), the lower state court rulings represent findings that the Respondent made and communicated to his lawyer a decision not to appeal. The Alabama Supreme Court in effect held that under Anders v. California (386 U.S. 738, 18 L.Ed.2d 493, 87 S.Ct. 1396 [1967]) the attorney had a duty to appeal automatically. In so holding, the Alabama Supreme Court erroneously reversed the

respective roles of attorney and client in the taking of appeals, ruled contrary to the decisions of this Honorable Court (Jones v. Barnes, above, 77 L.Ed.2d 987, 993), created a situation where convicted person's rights could be seriously prejudiced, and rejected a ninety (90) year line of authority by this Honorable Court. McKane v. Durston, 153 U.S. 684, 38 L.Ed.2d 867, 14 S.Ct. 913 (1894); Jones v. Barnes, above. It is the client who has the right to decide whether or not to appeal and the client who must communicate his decision to his attorney. Judged by this standard, the Respondent's attorney did not err.

The undisputed evidence in this case is that any appeal would have been frivolous. Not appealing a frivolous

case is manifestly not prejudicial within the meaning of Strickland v. Washington, above. This contradicts nothing in Anders v. California, above, since the appeal at issue in that case was expressly found to be non-frivolous. Anders v. California, 386 U.S. 738, 741, 743, 18 L.Ed.2d 493, 496, 498).

ARGUMENT

REASON FOR GRANTING THE WRIT: CONFLICT WITH THIS HONORABLE COURT'S DECISION IN STRICKLAND V. WASHINGTON (___ U.S. ___, 80 L.Ed.2d 674, 104 S.Ct. [1984])

A.

THE APPLICABILITY OF STRICKLAND V. WASHINGTON

In Strickland v. Washington (___ U.S. ___, 80 L.Ed.2d 674, 104 S.Ct. ___ [1984]) this Honorable Court set the standards for judging effective assistance of counsel at trial. (80

L.Ed.2d 674, 693) The first issue in this case is whether the Strickland standards apply to counsel on appeal.

There are fundamental differences in trial and appeal. The right to a trial is a fundamental constitutional right, and the right to trial counsel is expressly guaranteed by Sixth Amendment, made applicable to the states by the Fourteenth Amendment. This Honorable Court outlined these differences in Ross v. Moffitt (417 U.S. 600, 41 L.Ed.2d 341, 94 S.Ct. 2437 [1974]), with these words:

> "...At the trial stage of a criminal proceeding, the right of an indigent defendant to counsel is fundamental and binding upon the States by virtue of the Sixth and Fourteenth Amendments. But there are significant differences between the trial and appellate stages of a criminal proceeding. The purpose of the trial stage from the State's point of view is to convert a criminal defendant from a person presumed innocent to one found guilty beyond a reasonable doubt...

"By contrast, it is ordinarily the defendant, rather than the State, who initiates the appellate process, seeking not to fend off the efforts of the State's prosecutor but rather to overturn a finding of guilt made by a judge or jury below....

"This difference is significant for, while no one would agree that the State may simply dispense with the trial stage of proceedings without a criminal defendant's consent, it is clear that the State need not provide any appeal at all. McKane v. Durston, 153 U.S. 684, 38 L.Ed.867, 14 S.Ct. 913 (1894)...." (417 U.S. 600, 610-611, 41 L.Ed.2d 341, 351; emphasis supplied).

The Constitutional basis of appeal has been stated and restated many times by this Court. Just last year this Honorable Court restated that basis with these words:

"...There is, of course, no constitutional right to an appeal, but in Griffin v.

> Illinois, 351 U.S. 12, 18, 100 L.Ed.891, 76 S.Ct. 585, 55 A.L.R. 2d 1055 (1956), and Douglas v. California, 372 U.S. 353, 9 L.Ed.2d 811, 83 S.Ct. 814 (1963), the Court held that if an appeal is open to those who can pay for it, an appeal must be provided for an indigent...." (Jones v. Barnes, ___ U.S. ___, 77 L.Ed. 987,993, 103 S.Ct. ___ [1983])

See also Estelle v. Dorrough, 420 U.S. 534, 43 L.Ed.2d 377, 95 S.Ct. 1173 (1974); Wainwright v. Torna, 455 U.S. 586, 71 L.Ed.2d 475, 102 S.Ct. 1300 (1982), and many others.

Thus, an accused's trial rights are based on his fundamental right to be presumed innocent until the contrary is proven in a fair trial. But, as this Court has recognized, appeal is nearly the reverse of the trial situation. On appeal by a convict, the presumption is that he has been proven guilty beyond a

reasonable doubt in a fair and proper trial. To prevail at trial, the accused need do nothing; if the government fails to carry its burden, the accused is due to be acquitted. On appeal of a conviction, the roles are reversed. The convict carries the burden of showing error in the face of a presumption of correctness, and it is the government which need do nothing. See, for example, Hicks v. State, 437 So.2d 1344 (Cr.App. Ala., 1982);[10] Aff'd 437 So.2d 1346 (S.Ct. Ala., 1983).

Since the right to trial counsel is fundamental under the Sixth Amendment,

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10. Due to administrative error and the inexperience of the originally designated appellate prosecutor, the State filed a letter "declining to file a brief." This is recognized as the Alabama Attorney General's way of "confessing error." Yet, the Court of Criminal Appeals affirmed.

while the right to counsel on appeal is derived from state law and is of constitutional proportions only to the extent that the states may not practice invidious discrimination it would appear that the standards of effective assistance of counsel on appeal may be somewhat lower than the standards for trial counsel. Arguably, the standards for counsel on appeal ought to be set by uniformly applicable state law.[11]. However, it can not be argued that performance by appellate counsel which passes muster under the Sixth Amendment

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11. "...This procedure will assure penniless defendants the same rights and opportunities on appeal - as nearly as is practicable - as are enjoyed by those in a similar situation but who are able to afford the retention of private counsel...." Anders v. California, 386 U.S. 738, 745, 18 L.Ed.2d 493, 499, 87 S.Ct. 1396 (1967).

standards for trial counsel, would miss the mark of effective assistance of counsel on appeal.

The Sixth Amendment standards for effective assistance of counsel, as stated above, were set out in Strickland v. Washington (___ U.S. ___, 80 L.Ed.2d 674, 104 S.Ct. ___ [1984]). Speaking for the Court, Justice O'Connor wrote:

> "...A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense...." (80 L.Ed.2d 674, 693).

Justice O'Connor expanded on these components as follows:

On the standard of performance for counsel:

> "...Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proven unsuccessful, to conclude that a particular act or omission of counsel was unreasonable... Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance...." (80 L.Ed.2d 674, 694; emphasis supplied)

> "...[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judg-

ment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance...." (80 L.Ed.2d 674, 695)

On prejudice:

"...The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different...." (80 L.Ed.2d 674, 698)

On both:

"...Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one...." (80 L.Ed.2d 674, 699)

Applying the first component to counsel on appeal involves simply determining whether the defendant has shown that counsel's actions or omissions were in keeping with what is expected of appellate counsel in general. Needless to say such expectations are the same in indigent and non-indigent appeals. e.g. Anders v. California, 386 U.S. 783, 18 L.Ed.2d 493, 87 S.Ct. 1396 (1967) (See the language quoted at note 11, above); Jones v. Barnes, ___ U.S. ___, 77 L.Ed.2d 987, 103 S.Ct. ___ (1983) Applying the second component involves merely determining whether there is a reasonable probability that, but for the alleged acts or omissions, the result would have been more favorable to the accused. In the case of not taking an appeal, this would mean, at a minimum, a showing that

there is a reasonable probability that the appeal would have resulted in the setting aside of the conviction or the sentence or some portion thereof.

Although Strickland emphasizes that the two components are independent, in this case, this Respondent was not deprived of effective assistance of counsel under either component.

B.

COUNSEL'S PERFORMANCE WAS NOT DEFICIENT.

In judging counsel's performance in this case it is necessary first to identify what counsel did and what he did not do.

There is no claim in this case that counsel failed to confer with his client, failed to advise his client concerning

appeal, and there is no evidence that the attorney refused to appeal his client's conviction. If the Respondent's attorney's performance was deficient in any fashion it must be in regard to three acts by the attorney:

1. He formed a professional judgment that there was nothing to argue on appeal and that an appeal would be frivolous.

2. He communicated this judgment to his client and recommended that no appeal be taken.

3. He did not appeal because he understood that his client had decided not to appeal.

Obviously, forming a professional judgment about what can be and should be argued in an appeal is one of the most

important tasks of appellate counsel. See generally Jones v. Barnes, ___ U.S. ___, 77 L.Ed.2d 987, 103 S.Ct. ___ (1983). In carrying out this task, the Respondent's attorney concluded that an appeal would be frivolous. No one questions the accuracy of counsel's judgment. In fact, the Respondent's wording of his claim in his coram nobis petition (See footnote 2, page 5), suggests that he concurred in the attorney's judgment but thought that the attorney should have gone out and "investigat[ed]" in an effort to find something to "insert" in the record. There is no suggestion in this record that such an investigation would have turned up anything nor, if it had, how it could have been incorporated in the record. Obviously, counsel's performance

in this regard was not only not deficient but was in full accord with his professional responsibilities.

There would be little point in an attorney's forming a professional judgment and then keeping it to himself. Obviously, the judgment must be communicated to the client along with a recommendation. Given that the Respondent's attorney had formed a professional judgment that an appeal would be frivolous, it is difficult to see how any issue can be made of his advice that no appeal be taken. Certainly, a paying client would have expected such advice.

We now come to the crux of counsel's performance: Did the attorney act correctly in light of his client's statement that "...he would go and build his time and get it over with...." (Tr.p.

28) The lower state courts treated this as an issue of fact: Did the attorney correctly understand the statement to be a communication of a decision not to appeal? It was certainly reasonable for the attorney to so understand the statement in light of his previous conversations with his client. The fact that the Respondent called the attorney to the jail after the time for appeal had run and told him to appeal, tends to support the attorney's understanding. Why call the attorney to the jail for new instructions, unless the client had changed his mind. The findings and orders of the Circuit Court and the Court of Criminal Appeals represent, in light of Alabama law,[12] findings that during

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12. Longmire v. State, 443 So.2d 1265 (S.Ct. Ala., 1982)

the time when appeal was possible, the Respondent made and communicated to his lawyer a decision not to appeal.

The Alabama Supreme Court avoided these findings of fact by holding that Anders v. California (386 U.S. 738, 18 L.Ed.2d 493, 87 S.Ct. 1396 (1967]) required an attorney to appeal automatically unless the client clearly and affirmatively forbids appeal. Such an interpretation of Anders is, of course, outlandish. That case did not involve the taking of appeals at all but the duties of appellate counsel once the decision to appeal has been made and implemented. More significantly, the Alabama Supreme Court has ruled contrary to the constitutional policy articulated

by this Honorable Court[13] and completely reversed the respective roles of attorneys and clients in the taking of appeals. Traditionally the client decided whether or not to appeal, while the attorney could decline to handle the appeal, if he was retained, or ask to withdraw, if he was appointed. See Anders, 386 U.S. 738, 744, 18 L.Ed.2d 493, 498. Under the Alabama Supreme Court's reading of the Federal Constitution, appeal follows automatically upon conviction and it is the client who must by clear and affirmative action stop the appellate process. This is significant,

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13. "...It is also recognized that the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal...." (Jones v. Barnes, 77 L.Ed.2d 987, 993; emphasis supplied)

because, while most indigent convicts view appeal as a "can't lose" proposition, such is not always the case. For example, a favorable judgment and sentence based on a guilty plea can be wiped out on appeal, reinstating the original charges and sentence exposure.[14]. On retrial after a reversal

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14. "...If the state court decides to allow withdrawal of the plea, the petitioner will, of course, plead anew to the orginal charge on two felony counts...." Santobello v. New York, 404 U.S. 257, 263, 30 L.Ed. 427, 433, 92 S.Ct. 495 (1971).

See also, Clark v. State, 294 Ala. 485, 318 So.2d 805 (1974) cert. den. 423 U.S. 937, 46 L.Ed.2d 70, 96 S.Ct. 298 (1975).

This is a real problem. For example, in Alston v. State (___ So.2d ___ [Cr.App. Ala., June 12, 1984]), the convict appealed from a conviction based on a plea bargain. The Court of Appeals reversed. While the State's application for rehearing was pending, the successful Appellant moved to dismiss the appeal and to reinstate the original conviction and (Continued)

on appeal, a convicted person can receive a harsher sentence from a judge [15] or jury.[16] A favorable erroneous ruling by a trial judge might be overturned on appeal, even though the state could not

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Footnote 14 continued:

sentence. Apparently the convict appealed simply to delay the commencement of his sentence only to discover that his successful, if ill-advised, appeal had the effect of wiping out a rather favorable judgment and sentence.

15. "...We hold that after retrial and conviction following a defendant's successful appeal, a sentencing authority may justify an increased sentence by affirmatively identifying relevant conduct or events that occurred subsequent to the original sentencing proceedings...." Wasman v. United States, ___ U.S. ___, ___ L.Ed.2d ___, ___ S.Ct. ___, 52 U.S. L. Wk. 5063, 5066-5067 (1984).

16. Chaffin v. Stenchcomb, 412 U.S. 17, 36 L.Ed.2d 714, 93 S.Ct. 1977 (1973)

have appealed.[17] A convict appellant's sentence might be stayed pending appeal,[18] prolonging the disruption of his life. In addition, in the case of non-indigent convicted persons, appeal is a costly process for which they must pay. For all of these reasons, the decision of whether or not to appeal ought to be, as this Honorable Court has stated, in the convicted person. Finally, as a matter

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17. See, Milner v. State, 414 So.2d 133 (Cr.App.Ala., 1981); cert. quash. Accused bargained his plea, obtaining an agreement from the prosecutor to partially waive the habitual offender provisions. The trial court approved and sentenced the defendant on that basis. On appeal by the convict, the Court held: Niether the prosecutor nor the judge could waive the habitual offender provisions, case reversed and remanded for trial.

18. Alabama v. Gamble, 509 F.2d 95 (5th Cir. 1975); cert. den. 423 U.S. 924, 46 L.Ed.2d 250, 96 S.Ct. 267. Convict-Appellant had no right to credit on his sentence for the time he was detained in the county jail pending appeal.

of simple logic, if, as this Honorable Court has consistently held from 1894[19] through last year,[20] there is no constitutional right to appeal, how could there be a right to an automatic appeal.

The attorney's duties in a criminal appeal are limited to advising the client concerning the appeal and implementing the client's decision once it is made. It is the client's right to decide whether or not to appeal and the client's duty to make that decision and to communicate it to his attorney within the time allowed for taking appeal. The attorney in this case advised his client concerning appeal and stood ready to

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19. McKane v. Durston, 153 U.S. 684, 38 L.Ed. 867, 14 S.Ct. 913 (1894)

20. Jones v. Barnes, ___ U.S. ___, 77 L.Ed.2d 987, 993, 103 S.Ct. ___ (1983)

perfect the appeal should the client reject his advice. If the attorney did not appeal it was because the client communicated a decision not to appeal. If there was any dereliction here, it was not that of the attorney.

Unless the Alabame Supreme Court is correct in ruling that an automatic appeal is mandated in every criminal case by the U.S. Constitution, this attorney's performance met that expected of appellate counsel in criminal cases.

C.

THE ATTORNEY'S OMISSION DID NOT PREJUDICE THE RESPONDENT

Under the Strickland standards for counsel at trial, there can be no finding of ineffective assistance of counsel unless it appears that there is a reason-

able probability that but for counsel's act or omission, the result would have been more favorable to the accused. Applying this standard to an attorney's not taking appeal, the issue would be: Had an appeal been taken, is there a reasonable probability that the convicted person would have received a new trial, a reduction in sentence or otherwise benefited from the appeal?

The undisputed evidence in this case is that any appeal would have been fivolous and there was nothing to even argue in an appeal. At the coram nobis hearing there was not even a claim to the contrary. A more obvious example of a non-prejudicial omission by counsel than the failure to take a frivolous appeal cannot be imagined.

Of course, it could be argued that appellate courts, being human institutions, sometimes erroneously reverse even frivolous cases. However, Strickland holds that such possibilities do not enter the prejudice formula. Justice O'Connor wrote:

> "...An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, nullification, and the like. A defendant has no entitlement to the luck of a lawless decisionmaker, even if a lawless decision cannot be reviewed. The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision. It should not depend on the idiosyncracies of the particular decisionmaker, such as unusual propensities toward harshness or leniency...." (Strickland v. Washington, 80 L.Ed.2d 674, 698)

Thus, in judging prejudice from an attorney's not appealing, it must be presumed that the appellate courts would have proceeded in a normal, proper fashion and rejected a frivolous appeal.

Finally, it must be observed that nothing argued here contradicts anything in Anders v. California (386 U.S. 738, 18 L.Ed.2d 493, 87 S.Ct. 1396 [1967]). In Anders the Court expressly pointed out that the appeal at issue there would not have been frivolous. The Court further found a probable violation at trial of the rule of Griffin v. California (380 U.S. 609, 14 L.Ed.2d 106, 85 S.Ct. 1229 [1965]). Anders, 386 U.S. 738, 741, 743, 18 L.Ed.2d 493, 496, 498. Here, however, there is no suggestion of any arguable error. As the attorney advised his client, an appeal would have had no

effect on his case.

Under the Strickland standard, it affirmatively appears that counsel's omission did not prejudice the Respondent.

CONCLUSION

In conclusion, the Petitioner State respectfully submits that the decision and opinion of the Alabama Supreme Court in this case conflicts with the prior decisions of this Honorable Court on the respective rights and duties of convicted persons and their attorneys in the taking of appeals and on the standards for the effective assistance of counsel under the United States Constitution. For these reasons, the Petitioner prays that this Honorable Court will issue the writ of certiorari and review the decisions and

opinions of the Honorable Appellate Courts of Alabama and on such review will reverse the decisions of said Courts to the extent that the same hold that the conduct of the attorney in this case violated the United States Constitution.

Respectfully submitted,

CHARLES A. GRADDICK
ATTORNEY GENERAL

GERRILYN V. GRANT
ASSISTANT ATTORNEY GENERAL

JOSEPH G. L. MARSTON, III
ASSISTANT ATTORNEY GENERAL

ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

I, Joseph G. L. Marston, III, an Assistant Attorney General of Alabama, a member of the Bar of the Supreme Court of the United States and one of the Attorneys for the State of Alabama, Petitioner, do hereby certify that on this ___ day of August, 1984, I did serve the requisite number of copies of the foregoing on the Attorneys* for Earnest James Sturdivant, Respondent, and a courtesy copy on his former attorney** by mailing same to them, first class postage prepaid and addressed as follows:

Honorable Blanchard L. McLeod, Jr.*
Honorable J. Patrick Cheshire
Attorneys at Law
P. O. Box 656
Selma, Alabama 36702

Honorable Robert R. Blair**
Attorney at Law
P. O. Box 976
Selma, Alabama 36702

JOSEPH G. L. MARSTON, III
ASSISTANT ATTORNEY GENERAL

ADDRESS OF COUNSEL:

Office of the Attorney General
250 Administrative Building
64 North Union Street
Montgomery, Alabama 36130
(205) 834-5150

84-321

NO._____

Office - Supreme Court, U.S.
FILED
AUG 27 1984
ALEXANDER L. STEVAS
CLERK

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1983

STATE OF ALABAMA, PETITIONER

VS.

EARNEST JAMES STURDIVANT, RESPONDENT

APPENDICIES TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT AND COURT OF CRIMINAL APPEALS OF ALABAMA

OF

CHARLES A. GRADDICK
ATTORNEY GENERAL

GERRILYN V. GRANT
ASSISTANT ATTORNEY GENERAL

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ATTORNEYS FOR PETITIONER

34pp

NO._____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1983

STATE OF ALABAMA, PETITIONER

VS.

EARNEST JAMES STURDIVANT, RESPONDENT

APPENDICIES TO THE
PETITION FOR A WRIT OF CERTIORARI TO
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APPEALS OF ALABAMA

OF

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ATTORNEYS FOR PETITIONER

TABLE OF APPENDICIES

PAGE

APPENDIX "A", CERTIFICATION, AS OF JULY 17, 1984, OF ORDERS IN STURDIVANT V. STATE, ____ So. 2d ____ (Cr.App. Ala., Nov. 29, 1983)..... 1

APPENDIX "B", OPINION IN EX PARTE: STURDIVANT; Re: STURDIVANT V. STATE; ____ So.2d ____ (S. Ct. Ala., May 11, 1984)..... 3

APPENDIX "C" ORDER DENYING REHEARING BUT MODIFYING OPINION; ___ So.2d ___ (S.Ct.Ala., July 6, 1984)..... 12

APPENDIX "D", Opinion In Sturdivant v. State, ____ So.2d ____ (Cr. App. Ala., 1984)..... 17

APPENDIX "E", JOINT MOTION TO CORRECT THE RECORD..... 21

CERTIFICATE OF SERVICE..... 31

APPENDIX "A"

THE STATE OF ALABAMA ---
JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

2 Div. 394

Earnest James Sturdivant

vs.

State of Alabama

Appeal from Dallas Circuit Court
#CC-81-107R.01

I, Mollie Jordan, Clerk of the Court of Criminal Appeals of Alabama, do hereby certify that the above-styled appeal was affirmed by this Court without opinion on November 29, 1983, and that the application for rehearing was overruled by this Court without opinion on January 10, 1984.

I further certify that on May 11, 1984, the Court of Criminal Appeals was reversed and the cause remanded to this Court by the Supreme Court of Alabama and

that the Supreme Court of Alabama overruled the application for rehearing on July 6, 1984, and the cause is presently pending on the dockets of this Court.

WITNESS, Mollie Jordan, Clerk of the Court of Criminal Appeals, this 17th day of July, 1984.

/s/ MOLLIE JORDAN
CLERK
COURT OF CRIMINAL APPEALS OF ALABAMA

APPENDIX "B"

MAY 11, 1984

THE STATE OF ALABAMA -----
JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1983-84

Ex parte Earnest James Sturdivant

83-441

PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF CRIMINAL APPEALS

(Re: Earnest James Sturdivant

v.

State)

BEATTY, JUSTICE.

The petitioner, Earnest James Sturdivant, was convicted of the charge of second degree robbery in the Circuit Court of Dallas County, Alabama, on May 5, 1982. He filed a petition for a writ of error coram nobis on May 17, 1983, alleging that he was denied the effective assistance of counsel due to the failure

or his court-appointed attorney to file a timely notice of appeal. The trial court denied that petition. Sturdivant appealed that denial to the Alabama Court of Criminal Appeals on September 29, 1983, and that court affirmed the trial court's judgment, without opinion. After the Court of Criminal Appeals denied his application for a rehearing, Sturdivant petitioned this Court for a writ of certiorari. We granted the writ to determine whether the Court of Criminal Appeals erred in affirming the trial court's judgment.

At the coram nobis hearing in the trial court, Sturdivant testified that he was first represented by Ed Greene. When Greene returned to his position as chief deputy district attorney of Dallas County, Robert Blair became Sturdivant's lawyer. Sturdivant testified that, after

his conviction, Blair visited him at the county jail and Sturdivant told him to appeal his conviction.

Blair testified that he and Sturdivant on several occasions after the trial and talked about taking an appeal. He further stated that he informed Sturdivant that "the possibility of a successful appeal was very slim at best," and, therefore, he discouraged his client from taking an appeal. He also advised his client that, if he should succeed on appeal, he would probably be retried and could possibly be convicted of the more serious offense of robbery in the first degree. The State's brief indicates that Blair thought that an appeal would be frivolous because, in his opinion, no error had been committed. Additionally, during the last conversation which Blair had with Sturdivant prior to the

expiration of the time for appeal, Sturdivant indicated that he would "go and build his time and get it over with." Subsequently, Sturdivant told Blair he wanted to appeal, and Blair told him the time for appeal had run out.

Sturdivant asserts that he was denied the effective assistance of counsel because Blair failed to comply with the requirements of Anders v. California, 386 U.S. 738 (1967). In Anders, the Court addressed the "extent of the duty of a court-appointed appellate counsel to prosecute a first appeal from a criminal conviction, after that attorney has conscientiously determined that there is no merit to the indigent's appeal." Anders had been convicted of the felony of possession of marijuana and subsequently sought to appeal. He moved that the California

District Court of Appeal appoint counsel for him. The court granted that motion, and the attorney filed a no-merit letter in the appellate court, stating:

> "I will not file a brief on appeal as I am of the opinion that there is no merit to the appeal. I have visited and communicated with Mr. Anders and have explained my views and opinions to him. ...[H]e wishes to file a brief in this matter on his own behalf."

Anders then asked for the appointment of another attorney, but the court denied that request, so Anders filed his brief pro se. After the State had filed its brief, Anders filed a reply brief, following which the District Court of Appeals affirmed the conviction. The United States Supreme Court granted certiorari after the Supreme Court of California and the District Court of Appeal denied Ander's petition for a writ

of habeas corpus.

The United States Supreme Court reversed and remanded the cause stating:

> "The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of amicus curiae. The no-merit letter and the procedure it triggers do not reach that dignity. Counsel should, and can with honor and without conflict, be of more assistance to his client and to the court. His role as advocate requires that he support his client's appeal to the best of his ability. Of course, if counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished the indigent and time allowed him to

> raise any points that he chooses; the court--not counsel--then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous. If it so finds it may grant counsel's request to withdraw and dismiss the appeal insofar as federal requirements are concerned, or proceed to a decision on the merits, if state law so requires. On the other hand, if it finds any of the legal points arguable on their merits (and therefore not frivolous) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal." (Footnote omitted.) Anders, supra, 386 U.S. at 744.

In Alabama, state law requires the appropriate appellate court to proceed to a decision on the merits. Code of 1975, §12-22-130, provides:

> "A person convicted of a criminal offense in the circuit court or other court from which an appeal lies directly to the supreme court or court of criminal appeals may appeal

> from the judgment of conviction to the appropriate appellate court."

Applying Anders to Alabama practice, once counsel has complied with the requirements of that case, the Court of Criminal Appeals may grant counsel's request to withdraw, but must appoint substitute counsel to argue the appeal for the indigent.

In the case at bar, the requirements of Anders were not followed. Sturdivant's statement that he would "go and build his time" did not necessarily mean that he did not wish to contemporaneously proceed with the appeal; thus his counsel was not relieved of his duty to either appeal the conviction or to withdraw from the case after following the guidelines of Anders. Due to this inadvertent failure, Sturdivant was denied the procedure set forth in Anders

and, therefore, the trial court should have granted Sturdivant's petition. It also follows that the Court of Criminal Appeals erred in affirming that denial.

Accordingly, we have no option but to follow the mandate of the Anders opinion and, therefore, we must reverse the judgment of the Court of Criminal Appeals and remand this cause to that court with directions to allow petitioner an out-of-time appeal. See Longmire v. State, 443 So.2d 1265 (Ala. 1982). It is so ordered.

REVERSED AND REMANDED.

All the Justices concur.

APPENDIX "C"

MAILING ADDRESS: TELEPHONE: 261-4609

P. O. Box 157
Montgomery, Alabama 36101

OFFICE OF
CLERK OF THE SUPREME COURT
STATE OF ALABAMA
MONTGOMERY

Re: 83-441

EX PARTE: EARNEST JAMES STURDIVANT
PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS
(RE: EARNEST JAMES STURDIVANT VS. STATE)
Appellant Appellee

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

_____ Appeal docketed. Future correspondence should refer to the above number.

_____ Court Reporter granted additional time to file reporter's transcript to and including

_____ Clerk/Register granted additional time to file clerk's record/record on appeal to and including

_____ Appell _____ granted 7 additional days to file briefs to and including

_____ Appellant(s) granted 7 additional days to file reply briefs to and including

_____ Record on Appeal filed

_____ Appendix Filed

_____ Submitted on Briefs

_____ Petition for Writ of Certiorari denied. No opinion.

_____ Application for rehearing overruled. No opinion written on rehearing.

_____ Permission to file amicus curiae briefs granted

XXXX Application for rehearing overruled; opinion modified. All Justices concur.

NOTE: Please substitute the attached page 2. in the opinion which was mailed to you on May 11, 1984.

7-6-84m

Robert G. Esdale, Clerk

By: /s/ Dorothy F. Norwood
Dorothy F. Norwood,
Deputy Clerk
Supreme Court of Alabama

Court of Criminal Appeals on September 29, 1983, and that court affirmed the trial court's judgment, without opinion. After the Court of Criminal Appeals denied his application for a rehearing, Sturdivant petitioned this Court for a writ of certiorari. We granted the writ to determine whether the Court of Criminal Appeals erred in affirming the trial court's judgment.

At the coram nobis hearing in the trial court, Sturdivant testified that he was first represented by Ed Greene. When Greene returned to his position as chief deputy district attorney of Dallas County, Robert Blair became Sturdivant's lawyer. Sturdivant testified that, after his conviction, Blair visited him at the county jail and Sturdivant told him to appeal his conviction.

Blair testified that he and Sturdivant on several occasions after the trial talked about taking an appeal. He further stated that he informed Sturdivant that "the possibility of a successful appeal was very slim at best," and, therefore, he discouraged his client from taking an appeal. He also advised his client to the effect that, if he should succeed on appeal, he would probably be retried and could possibly be convicted of the more serious offense of robbery in the first degree. The State's brief indicates that Blair thought that an appeal would be frivolous because, in his opinion, no error had been committed. Additionally, during the last conversation which Blair had with Sturdivant prior to the expiration of the time for appeal, Sturdivant indicated that he would "go and build his time and get it

over with." Subsequently, Sturdivant told Blair he wanted to appeal, and Blair told him the time for appeal had run out.

Sturdivant asserts that he was denied the effective assistance of counsel because Blair failed to comply with the requirements of Anders v. California, 386 U.S. 738

APPENDIX "D"

AUGUST 14, 1984

THE STATE OF ALABAMA--
JUDICIAL DEPARTMENT

THE ALABAMA COURT OF
CRIMINAL APPEALS

OCTOBER TERM, 1983-84

2 Div. 394

Earnest James Sturdivant

v.

State

Appeal from Dallas Circuit Court
On Remand from Supreme Court of Alabama

PATTERSON, JUDGE

On original deliverance this court affirmed the trial court's judgment, without opinion, denying Earnest James Sturdivant's petition for a writ of error coram nobis, wherein he alleged that he had been denied effective assistance of counsel due to the failure of his court appointed attorney to file a timely

notice of appeal. After this court denied his application for a hearing, he petitioned the Supreme Court of Alabama for a writ of certiorari, which was granted.

The Supreme Court of Alabama has determined that the requirements of Anders v. California, 386 U.S. 738 (1967), were not followed in this case, and that Sturdivant's defense counsel was not relieved of his duty to appeal the conviction or withdraw from the case following the guidelines of Anders. The Supreme Court further determined that due to the inadvertent failure of the defense counsel to perfect an appeal, Sturdivant was denied the procedure set forth in Anders, and therefore , the trial court should have granted his petition. Sturdivant v. State, [Ms. 83-441, May 11,

1984] ___ So.2d ___ (Ala., 1984). The Supreme Court held that this Court erred in affirming the judgment of the trial court, and reversed and remanded the cause to this court with directions to allow Sturdivant an out-of-time appeal. Sturdivant v. State, supra.

Accordingly, the judgment of the circuit court denying the petition for writ of error coram nobis is reversed, and this cause is remanded to that court with directions that the petitioner be afforded an out-of-time appeal, pursuant to the authority expressed in Sturdivant v. State, supra.

In reference to the out-of-time appeal referred to above, it is directed that the time for filing the Record on Appeal shall begin to run as if notice of appeal had been given on the date of this

opinion; otherwise the Alabama Rules of Appellate Procedure shall apply.

REVERSED AND REMANDED.

ALL JUDGES CONCUR.

APPENDIX "E"

[NOTE: The following is a joint motion filed by the parties in the Court of Criminal Appeals of Alabama after the Alabama Supreme Court denied rehearing. It was drafted by counsel for Appellant Sturdivant and endorsed by counsel for the State of Alabama.]

IN THE ALABAMA COURT OF
CRIMINAL APPEALS

EARNEST JAMES STURDIVANT,	)	
	)	
Appellant	)	
	)	
vs.	)	2 Div. 394
	)	
THE STATE OF ALABAMA,	)	
	)	
Appellee	)	

JOINT MOTION TO CORRECT THE RECORD

COMES NOW the Appellant, Earnest James Sturdivant, by and through his attorneys or record, Blanchard L. McLeod and J. Patrick Cheshire, and the Appellee, State of Alabama, by and through its Assistant Attorney General,

Joseph G. L. Marston, III and its Attorney General, Charles A. Graddick, and would jointly move this Court to correct the record in this cause in the following respects:

1. That Page 2 of the Opinion of the Supreme Court of Alabama rendered on July 6, 1984, recites the following:

> "...He also advised his client to the effect that, if he should succeed on appeal, he would probably be retried and could possibly be convicted of the more serious offense of robbery in the first degree." (Emphasis added.)

2. That the record in this cause does not support such a statement.

3. That the Appellant's only testimony relating to this point is as follows:

****

> Q. What are you saying he told you about an appeal?

A. He told me -- he told me about an appeal that I -- that if I appealed it and come back, I could get more time.

Q. That's what he told you?

A. He told me that if I got a new trial it could possibly get more time. (TR.13)

****

Q. ...Now what are you saying that he did or didn't do that he should have done in that respect?

A. On appeal, when he came back out to the jail after I got sentenced, I told him to get the case appealed, but he didn't.

Q. Did he tell you why he wasn't going to?

A. He told me that I could get more time. I could get more time, and that's about all. (TR. 15-16)

4. That Mr. Blair, the attorney of record for the Appellant in the Trial Court testified as follows:

> A. ...That if the Appeal should be granted and he should be successful on appeal, the chances were extremely high that he would be brought back to Dallas County and that he would be retried and that the evidence would be the same or substantially the same as it was in his first trial. That the likelihood was great that he would be convicted and that all his efforts and all the time he spent on appeal would be for naught.... (TR. 28)

5. That attached hereto and marked as "Exhibit A" is the affidavit of Robert R. Blair, the attorney who represented the Appellant in the Trial Court; and that such affidavit contains matters not presented at the hearing on the Petition for Writ of Error Coram Nobis on August 5, 1983, and that the matters presented in such affidavit should be considered, along with the record herein.

6. That the portion of the sentence referred to in Paragraph One herein is erroneous and reflects badly upon the reputation of an honorable member of the bar of this State; and further, that such statement by the Supreme Court of Alabama is tantamount to a finding of fact that such incompetent advice was given; and that such statement by the Supreme Court of Alabama is not supported by the record herein.

7. That this Court should correct the portion of the referenced sentence referred to in Paragraph One herein to properly reflect the testimony in this cause.

RESPECTFULLY SUBMITTED this the 25th day of July, 1984.

/s/ Blanchard L. McLeod, Jr.
Blanchard L. McLeod, Jr.
Attorney for the Appellant
P. O. Box 656
Selma, Alabama 36702

/s/ J. Patrick Cheshire
J. Patrick Cheshire
Attorney for the Appellant
P. O. Box 656
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/s/ Charles A. Graddick
Charles A. Graddick
Attorney General
250 Administrative Building
64 North Union Street
Montgomery, Alabama 36130

/s/ Joseph G. L. Marston, III
Joseph G. L. Marston
Assistant Attorney General
250 Administrative Building
64 North Union Street
Montgomery, Alabama 36130

STATE OF ALABAMA)
)
COUNTY OF DALLAS)

EXHIBIT "A"

AFFIDAVIT OF
ROBERT R. BLAIR

BEFORE ME, the undersigned authority, a Notary Public, in and for the State and County, personally appeared Robert R. Blair, who is known to me, and after being by me first duly sworn, does, on his oath, depose and say as follows:

"My name is Robert R. Blair and I am a licensed, practicing attorney in Selma, Dallas County, Alabama. I was the attorney of record for Earnest James Sturdivant in the trial of his case in the Circuit Court of Dallas County, Alabama, on May 4 and 5, 1981.

"Both the Attorney General's Office and the attorneys for Earnest James Sturdivant have provided me with copies of the Opinion of the Supreme Court of Alabama issued on July 6, 1984, and the transcript of the hearing on the Petition of Earnest James Sturdivant for Writ of Error Coram Nobis held in the Circuit Court of Dallas County, Alabama, on August 5, 1983, and I have reviewed both.

"I was never asked at the hearing on August 5, 1983, whether or not I advised Mr. Sturdivant that he could be retried for robbery in the first degree or

whether or not I told him that he could receive more time in the case at bar. I specifically deny that I ever told Mr. Sturdivant that if his conviction in the case at bar was reversed, that he could be retried for robbery in the first degree; and I further deny that I ever told Mr. Sturdivant that he could receive more time than he already had.

"During the weeks immediately after Mr. Sturdivant's trial in CC-81-107R, there was pending in the Circuit Court of Dallas County, Alabama, an indictment in case no. CC-81-108R, which is not before this Court, an indictment charging Mr. Sturdivant with robbery in the first degree arising out of the same events as the robbery of the Cougar Station, but alleging Leola Jones as the victim and one purse and one watch as the property taken. I did tell Mr. Sturdivant that

the prosecutors had indicated a strong desire to prosecute him for that charge; that, if convicted of robbery in the first degree against Leola Jones, he could face a possible life sentence and that I had filed a Motion to Amend the Plea or to Dismiss in that case. The trial court did not rule on that motion until after appeal time had expired, and the Court agreed with me on that Motion and dismissed the second indictment against Mr. Sturdivant. It is possible that Mr. Sturdivant confused in his mind what I was telling him about the pending robbery charge with the possibilities of what might happen to him depending on the outcome of an appeal in the case at bar.

"The above information is true, accurate and correct to the best of my knowledge, information, and belief."

/s/ Robert R. Blair
Robert R. Blair
Attorney at Law
P. O. Box 976
Selma, Alabama 36702
(205) 872-7431

SWORN TO AND SUBSCRIBED BEFORE ME

this the 18th day of July, 1984.

(SEAL)

/s/ Joyce Clements Reed
Notary Public, State at Large

Commission Expires:
9-25-85

CERTIFICATE OF SERVICE

I, Joseph G. L. Marston, III, an Assistant Attorney General of Alabama, a member of the Bar of the Supreme Court of the United States and one of the Attorneys for the State of Alabama, do hereby certify that on this _____ day of August, 1984, I did serve the requisite number of copies of the foregoing on the Attorneys* for Earnest James Sturdivant, Petitioner, and a courtesy copy on his former attorney**, by mailing the same to them first-class postage prepaid and addressed as follows:

Hon. Blanchard L. McLeod, Jr.*
Hon. J. Patrick Cheshire
Attorneys at Law
P. O. Box 976
Selma, Alabama 36702

Hon. Robert Blair**
Attorney at Law
P. O. Box 976
Selma, Alabama 36702

JOSEPH G. L. MARSTON, III
ASSISTANT ATTORNEY GENERAL

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

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NO. 84-321

Supreme Court, U.S.
FILED
OCT 15 1984
ALEXANDER L. STEVAS
CLERK

IN THE SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM, 1984

STATE OF ALABAMA,

PETITIONER,

VS.

EARNEST JAMES STURDIVANT,

RESPONDENT.

On Petition for a Writ of Certiorari
to the Supreme Court of Alabama

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS AND BRIEF
IN OPPOSITION TO GRANTING
PETITION FOR CERTIORARI

BLANCHARD L. McLEOD, JR.
(Counsel of Record)
J. PATRICK CHESHIRE

OF COUNSEL:

McLEOD & CHESHIRE
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OCTOBER 11, 1984

IN THE SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM, 1984

No. 84-321

STATE OF ALABAMA,

PETITIONER,

VS.

EARNEST JAMES STURDIVANT,

RESPONDENT.

On Petition for a Writ of Certiorari
to the Supreme Court of Alabama

MOTION FOR LEAVE TO FILE
BRIEF IN FORMA PAUPERIS

EARNEST JAMES STURDIVANT hereby moves, pursuant to Rule 46 of the Rules of this Court, for leave to file the attached Brief in Opposition to Granting Petition for Certiorari and all following documents, if any, In Forma Pauperis.

AS GROUNDS THEREFORE, EARNEST JAMES STURDIVANT refers to the attached Affidavit.

Respectfully Submitted,

BLANCHARD L. McLEOD, JR.
(Counsel of Record)

J. PATRICK CHESHIRE

OF COUNSEL:

McLEOD & CHESHIRE
Attorneys at Law
P. O. Box 656
Selma, AL 36702
(205) 875-2282

October 11, 1984

AFFIDAVIT

I, Earnest James Sturdivant, being first duly sworn according to law, depose and say that I am the respondent in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said case or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

1. Are you presently employed?

   a. No.
   b. Date of last employment: October, 1981
      Amount of salary and wages per month: $536.00
   c. I have been incarcerated since: May, 1982

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends or other source?

   a. No.

3. Do you own any cash or checking or savings accounts?

   a. No.

4. Do you own any real estate, stocks, bonds, notes, automobiles or other valuable property (excluding ordinary household furnishings and clothing)?

   a. No.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

   a. None

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Earnest J. Sturdivant
Earnest James Sturdivant

Subscribed and Sworn to before me

this 8 day of October, 1984.

Notary Public
State of Alabama at Large

My commission expires 5/26/87

NO. 84-321

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1984

STATE OF ALABAMA, PETITIONER

VS.

EARNEST JAMES STURDIVANT, RESPONDENT

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The respondent, Earnest James Sturdivant, asks leave to file the attached response to the Petition for Writ of Certiorari without prepayment of costs and to proceed in forma pauperis. Respondent has previously been granted leave to so proceed in both the Circuit Court of Dallas County, Alabama, the Alabama Court of Criminal Appeals and the Alabama Supreme Court as a pauper. Respondent's affidavit in support of this motion is attached hereto.

×Earnest J. Sturdivant
Earnest James Sturdivant

ATTORNEY FOR RESPONDENT:

McLEOD & CHESHIRE
Attorneys at Law
P. O. Box 656
Selma, AL 36702
(205) 875-2282

QUESTION PRESENTED

Whether the highest court in a state has the power to render a decision as to the procedures to be followed in the courts of that state by court-appointed counsel representing an indigent criminal defendant.

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Authorities	iii
Opinion Below	1
Statement of the Case	1
The Facts	2
Reasons for Denying the Writ	4
I. THE DECISION OF THE ALABAMA SUPREME COURT DEALS STRICTLY WITH THE PROCEDURE THAT A DEFENSE COUNSEL FOR AN INDIGENT DEFENDANT MUST FOLLOW IN ORDER TO WITHDRAW FROM REPRESENTATION OF AN INDIGENT DEFENDANT ON APPEAL UNDER ALABAMA LAW	4
II. STRICKLAND V. WASHINGTON, __ U.S. __, 80 L.ED.2D 674, (1984), IS CLEARLY DISTINGUISHABLE FROM THE INSTANT CASE	5
III. PREJUDICE OCCURRED WHEN RESPONDENT WAS DENIED THE OPPORTUNITY TO EXERCISE HIS STATE CREATED RIGHT TO AN APPEAL	5
Conclusion	6
Appendix A	App. 1

TABLE OF AUTHORITIES

Page

Cases

Anders v. Califor.ia, 386 U.S. 738 (1967).....1,4,5

Bryan v. Brown, 339 So.2d 577 (Ala. 1976), cert. denied, 431 U.S. 954 (1977).....6

Campbell v. State, 182 Ala. 18, 62 So. 57 (1913).....6

Douglas v. California, 372 U.S. 353 (1963).....4

Hubbard v. State, 382 So.2d 577 (Ala. Crim. App. 1979).....1

Martin v. State, 277 Ala. 153, 167 So.2d 912 (1964).....1

Strickland v. Washington, __ U.S. _, 80 L.Ed.2d 674 (1984).....5

Turner v. State, 365 So.2d 335 (Ala. Crim. App.), cert. denied, 365 So.2d 336 (Ala. 1978).....6

Tyson v. State, 361 So.2d 1182 (Ala. Crim. App. 1978).....6

Statutes

Alabama Code Section 12-22-130 (1975).....2,4,5

Alabma Code Section 12-22-192 (1975).....2

Alabama Code Section 15-12-22 (b) (1975).....2

Alabama R.A.P. 3 (a) (2).....5

Alabama R.A.P., Rule 4.....6

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IN THE SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM, 1984

No. 84-321

STATE OF ALABAMA,

PETITIONER,

VS.

EARNEST JAMES STURDIVANT,

RESPONDENT.

On Petition for a Writ of Certiorari
to the Supreme Court of Alabama

BRIEF IN OPPOSITION TO GRANTING PETITION FOR CERTIORARI

OPINIONS BELOW

The Respondent will refer to Appendix A, as stated in Respondent's Brief. A copy of same is attached hereto, infra.

STATEMENT OF THE CASE

A unanimous Alabama Supreme Court held that the proper procedure for applying the guidelines set out in Anders v. California, 386 U.S. 738 (1967), under the statutory law of Alabama was as follows:

1. That once an indigent defendant has expressed his desire to appeal, his court-appointed attorney is obligated to bring that appeal. Martin v. State, 277 Ala. 153, 167 So.2d 912 (1964), Hubbard v. State, 382 So.2d 577 (Ala. Crim App. 1979).

2. That upon receiving the transcript (which

can only be acquired at state expense after notice of appeal has been filed, Ala. Code Sec. 12-22-192, (1975).) counsel must make a conscientious search of the transcript and if he finds no merit in the appeal, he must file a motion to withdraw setting out his reasons for withdrawal accompanied by a brief outlining any possible points that may be argued in favor of the indigent defendant.

3. That once such a brief is filed, Alabama law dictates that the appellate court must then review the brief. Once defense counsel has complied with the requirements set out by the Alabama Supreme Court, the Court of Criminal Appeals may grant counsel's request to withdraw, however, since Alabama law requires that an appellate court must proceed to a decision on the merits of the case, Ala. Code Sec. 12-22-130, (1975), it is the duty of the appellate court to appoint substitute counsel to argue the appeal for the indigent, Ala. Code Sec. 15-12-22 (b), (1975).

The Facts

The respondent, Earnest James Sturdivant, was previously convicted of Robbery in the Second Degree and sentenced to the State Penitentiary on May 5, 1982. (T-5) On May 17, 1983, the Petition for Writ of Error Coram Nobis was filed with the trial court alleging among other things that the respondent was denied the effective assistance of counsel due to the failure of the client's court-appointed attorney to file a timely notice of appeal. (T-1-4)

At the Coram Nobis Hearing before the Hon. E. P. Russell, Jr., the respondent stated that he asked his court-appointed attorney to appeal his case. (T-5) The respondent

indicated that on three separate occasions he discussed the appeal with his court-appointed attorney plus the fact that respondent's mother called and talked with the attorney about an appeal. (R-12 & R-26)

The Hon. Robert R. Blair, the court-appointed attorney for the respondent who tried the case, indicated that he and the respondent talked on several occasions after the trial and prior to the running of the time for the filing of an appeal. (R-27) The respondent's court-appointed counsel stated that he indicated to his client that he felt, "...he had gotten a break and was convicted of robbery in the second degree. That perhaps we ought to give some consideration to whether or not we wanted to take an appeal concerning his case." (R-27)

The respondent's court-appointed counsel told his client, "...that the possibility of a successful appeal was very slim at best." (R-28) In addition, court-appointed counsel advised his client, "That if the appeal should be granted and he should be successful on appeal, the chances were extremely high that he would be brought back to Dallas County and that he would be retried and that the evidence would be the same or substantially the same as it was in his first trial. That the likelihood was great that he would be convicted and that all his efforts and all the time he had spent on appeal would be for naught." (R-28)

The Alabama Court of Criminal Appeals affirmed the trial court without opinion. Since a further attempt to obtain an opinion from the Alabama Court of Criminal Appeals upon a motion for rehearing was also denied without opinion, a Petition for Writ of Certiorari was filed with the Alabama Supreme Court.

The Alabama Supreme Court granted the Petition for Writ of Certiorari on this matter and after hearing oral arguments, the state's highest court reversed the affirmance of the trial court by the Court of Criminal Appeals and remanded the case to the appeals court for a decision consistent with the opinion of the

Alabama high court.

REASONS FOR DENYING THE WRIT

I.

THE DECISION OF THE ALABAMA SUPREME COURT DEALS STRICTLY WITH THE PROCEDURE THAT A DEFENSE COUNSEL FOR AN INDIGENT DEFENDANT MUST FOLLOW IN ORDER TO WITHDRAW FROM REPRESENTATION OF AN INDIGENT DEFENDANT ON APPEAL UNDER ALABAMA LAW.

The right to appeal is a state-created right that is a creature of state statutes and the procedure that governs the application of appeals, as long as it does not conflict with due process and equal protection of the law as guaranteed by the United States Constitution, is clearly the province of the state. Douglas v. California, 372 U.S. 353, (1963).

The Office of the Attorney General has overlooked in their Petition for Writ of Certiorari the fact that this case was decided under Alabama law. Quoting from page four of the opinion:

> "In Alabama, state law requires the appropriate appellate court to proceed to a decision on the merits. Code of 1975 Sec. 12-22-130, provides:
>
> > 'A person convicted of a criminal offense in the circuit court or other court from which an appeal lies directly to the supreme court or court of criminal appeals may appeal from the judgment of conviction to the appropriate appellate court.'
>
> Applying Anders to Alabama practice, once counsel has complied with the requirements of that case, the Court of Criminal Appeals may grant counsel's request to withdraw, but must appoint substitute counsel to argue the appeal for the indigent."

Thus, although the opinions of the United States Supreme Court have provided a certain amount of guidance to the Alabama Supreme Court, the threshold question in the instant case concerns the right to appeal as it exists under Alabama law. Therefore,

the case of Anders v. California, 386 U.S. 738 (1967), does not come into play until the threshold question of Alabama law has been reached.

II.

STRICKLAND V. WASHINGTON, __ U.S. __, 80 L.Ed.2d 674, (1984), Is CLEARLY DISTINGUISHABLE FROM THE INSTANT CASE

The Office of the Attorney General in its Petition for Writ of Certiorari relies on the case of Strickland v. Washington, U.S. __, 80 L.Ed.2d 674, 104 S.Ct. __ (1984). The Office of the Attorney General has correctly stated that this case sets the standards for judging effective assistance of counsel at trial. However, the case now before this Honorable Court on a Petition for Writ of Certiorari in no way deals with the standards for effective assistance of counsel on either the trial or appellate level. The case now at bar deals only with whether the court-appointed attorney carried out his client's wish to exercise the right to an appeal granted to every convicted criminal defendant under Alabama law. Ala. Code Sec. 12-22-130, Ala. R.A.P. 3 (a)(2). All of the major statement of facts contained in the Petition for Writ of Certiorari of the Office of the Attorney General in pages 11, 12, 13, 14 and 15, deal with the trial. This case was never presented to the Alabama Supreme Court for any consideration of what transpired prior to the sentencing of the client. The Office of the Attorney General totally fails to state in its statement of the facts that the evidence was uncontroverted by any witness, including the State's witnesses, that the said Earnest James Sturdivant requested his trial counsel to file an appeal.

III.

PREJUDICE OCCURRED WHEN RESPONDENT WAS DENIED THE OPPORTUNITY TO EXERCISE HIS STATE CREATED RIGHT TO AN APPEAL.

The Office of the Attorney General attempts to state that the omission of the trial counsel did not prejudice the Respondent. However, in Alabama the right to an appeal from a

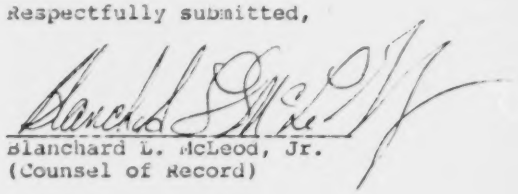
conviction of a criminal offense is wholly statutory in nature. Campbell v. State, 182 Ala. 18, 62 So. 57 (1913). Thus, should notice of appeal not be filed within the procedural time periods prescribed in Ala. R.A.P., Rule 4, the appellate courts of Alabama lose the jurisdiction to hear the appeal and the right to bring an appeal to the Alabama appellate courts is extinguished. Bryan v. Brown, 339 So.2d 577 (Ala. 1976), cert. denied, 431 U.S. 954 (1977); Tyson v. State, 361 So.2d 1182 (Ala. Crim. App. 1978); Turner v. State, 365 So.2d 335 (Ala. Crim. App.), cert. denied, 365 So.2d 336 (Ala. 1978).

Therefore, the denial of the right to appeal is presumed, as a matter of law, is not only prejudicial, but fatally so. Prejudice exists since there is a denial of a state created statutory right as well as a denial of a federal constitutional right to Due Process.

CONCLUSION

On the basis of the foregoing, Respondent requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,



Blanchard L. McLeod, Jr.
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October 11, 1984

APPENDIX

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MAY 11 1984
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SUPREME COURT OF ALABAMA

APPENDIX A

THE STATE OF ALABAMA - - - - - JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1983-84

Ex parte Earnest James Sturdivant

83-441

PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF CRIMINAL APPEALS

(Re: Earnest James Sturdivant

v.

State)

BEATTY, JUSTICE.

The petitioner, Earnest James Sturdivant, was convicted of the charge of second degree robbery in the Circuit Court of Dallas County, Alabama, on May 5, 1982. He filed a petition for a writ of error coram nobis on May 17, 1983, alleging that he was denied the effective assistance of counsel due to the failure of his court-appointed attorney to file a timely notice of appeal. The trial court denied that petition. Sturdivant appealed that denial to the Alabama

Court of Criminal Appeals on September 29, 1983, and that court affirmed the trial court's judgment, without opinion. After the Court of Criminal Appeals denied his application for a rehearing, Sturdivant petitioned this Court for a writ of certiorari. We granted the writ to determine whether the Court of Criminal Appeals erred in affirming the trial court's judgment.

At the coram nobis hearing in the trial court, Sturdivant testified that he was first represented by Ed Greene. When Greene returned to his position as chief deputy district attorney of Dallas County, Robert Blair became Sturdivant's lawyer. Sturdivant testified that, after his conviction, Blair visited him at the county jail and Sturdivant told him to appeal his conviction.

Blair testified that he and Sturdivant on several occasions after the trial talked about taking an appeal. He further stated that he informed Sturdivant that "the possibility of a successful appeal was very slim at best," and, therefore, he discouraged his client from taking an appeal. He also advised his client that, if he should succeed on appeal, he would probably be retried and could possibly be convicted of the more serious offense of robbery in the first degree. The State's brief indicates that Blair thought that an appeal would be frivolous because, in his opinion, no error had been committed. Additionally, during the last conversation which Blair had with Sturdivant prior to the expiration of the time for appeal, Sturdivant indicated that he would "go and build his time and get it over with." Subsequently, Sturdivant told Blair he wanted to appeal, and Blair told him the time for appeal had run out.

Sturdivant asserts that he was denied the effective assistance of counsel because Blair failed to comply with the requirements of Anders v. California, 386 U.S. 738

(1967). In Anders, the Court addressed the "extent of the duty of a court-appointed appellate counsel to prosecute a first appeal from a criminal conviction, after that attorney has conscientiously determined that there is no merit to the indigent's appeal." Anders had been convicted of the felony of possession of marijuana and subsequently sought to appeal. He moved that the California District Court of Appeal appoint counsel for him. The court granted that motion, and the attorney filed a no-merit letter in the appellate court, stating:

> "I will not file a brief on appeal as I am of the opinion that there is no merit to the appeal. I have visited and communicated with Mr. Anders and have explained my views and opinions to him. ... [H]e wishes to file a brief in this matter on his own behalf."

Anders then asked for the appointment of another attorney, but the court denied that request, so Anders filed his brief pro se. After the State had filed its brief, Anders filed a reply brief, following which the District Court of Appeal affirmed the conviction. The United States Supreme Court granted certiorari after the Supreme Court of California and the District Court of Appeal denied Anders's petition for a writ of habeas corpus.

The United States Supreme Court reversed and remanded the cause, stating:

> "The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of amicus curiae. The no-merit letter and the procedure it triggers do not reach that dignity. Counsel should, and can with honor and without conflict, be of more assistance to his client and to the court. His role as advocate requires that he support his client's appeal to the best of his ability. Of course, if counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might

> arguably support the appeal. A copy of counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses; the court--not counsel--then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous. If it so finds it may grant counsel's request to withdraw and dismiss the appeal insofar as federal requirements are concerned, or proceed to a decision on the merits, if state law so requires. On the other hand, if it finds any of the legal points arguable on their merits (and therefore not frivolous) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal." (Footnote omitted.) Anders, supra, 386 U.S. at 744.

In Alabama, state law requires the appropriate appellate court to proceed to a decision on the merits. Code of 1975, § 12-22-130, provides:

> "A person convicted of a criminal offense in the circuit court or other court from which an appeal lies directly to the supreme court or court of criminal appeals may appeal from the judgment of conviction to the appropriate appellate court."

Applying Anders to Alabama practice, once counsel has complied with the requirements of that case, the Court of Criminal Appeals may grant counsel's request to withdraw, but must appoint substitute counsel to argue the appeal for the indigent.

In the case at bar, the requirements of Anders were not followed. Sturdivant's statement that he would "go and build his time" did not necessarily mean that he did not wish to contemporaneously proceed with the appeal; thus his counsel was not relieved of his duty to either appeal the conviction or to withdraw from the case after following the guidelines of Anders. Due to this inadvertent failure, Sturdivant was denied the procedure set forth in Anders and, therefore, the trial court should have granted Sturdivant's petition. It also follows that the Court of Criminal Appeals erred in affirming that denial.

83-441

Accordingly, we have no option but to follow the mandate of the Anders opinion and, therefore, we must reverse the judgment of the Court of Criminal Appeals and remand this cause to that court with directions to allow petitioner an out-of-time appeal. See Longmire v. State, 443 So. 2d 1265 (Ala. 1982). It is so ordered.

REVERSED AND REMANDED.

All the Justices concur.

FILED
JUL 6 1984
CLERK
SUPREME COURT OF ALABAMA

Court of Criminal Appeals on September 29, 1983, and that court affirmed the trial court's judgment, without opinion. After the Court of Criminal Appeals denied his application for a rehearing, Sturdivant petitioned this Court for a writ of certiorari. We granted the writ to determine whether the Court of Criminal Appeals erred in affirming the trial court's judgment.

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Blair testified that he and Sturdivant on several occasions after the trial talked about taking an appeal. He further stated that he informed Sturdivant that "the possibility of a successful appeal was very slim at best," and, therefore, he discouraged his client from taking an appeal. He also advised his client [redacted] that, if he should succeed on appeal, he would probably be retried and could possibly be convicted of the more serious offense of robbery in the first degree. The State's brief indicates that Blair thought that an appeal would be frivolous because, in his opinion, no error had been committed. Additionally, during the last conversation which Blair had with Sturdivant prior to the expiration of the time for appeal, Sturdivant indicated that he would "go and build his time and get it over with." Subsequently, Sturdivant told Blair he wanted to appeal, and Blair told him the time for appeal had run out.

Sturdivant asserts that he was denied the effective assistance of counsel because Blair failed to comply with the requirements of Anders v. California, 386 U.S. 738

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SEP 26 1984
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CLERK

NO. 84-321

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1983

STATE OF ALABAMA, PETITIONER

VS.

EARNEST JAMES STURDIVANT, RESPONDENT

ON PETITION FOR A WRIT OF
CERTIORARI TO THE SUPREME COURT AND
COURT OF CRIMINAL APPEALS OF ALABAMA

REPLY BRIEF AND ARGUMENT

OF

CHARLES A. GRADDICK
ATTORNEY GENERAL

GERRILYN V. GRANT
ASSISTANT ATTORNEY GENERAL

JOSEPH G. L. MARSTON, III
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NO. 84-321

IN THE SUPREME COURT OF THE
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OCTOBER TERM, 1983

STATE OF ALABAMA, PETITIONER

VS.

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TABLE OF CONTENTS

	PAGE
TABLE OF CASES.....	ii
REPLY ARGUMENT.....	1
A. THE ALABAMA SUPREME COURT CONSTRUED THE UNITED STATES CONSTITUTION IN THIS CASE.....	1
B. APPLICABILITY OF STRICKLAND V. WASHINGTON.....	3
C. PREJUDICE.....	5
CONCLUSION.....	7
CERTIFICATE OF SERVICE.....	9

TABLE OF CASES

	PAGE
Anders v. California, 386 U.S. 738, 18 L.Ed.2d 493, 87 S.Ct. 1396 (1967).....	1,2, 4
Hicks v. State, 437 So.2d 1346 (S.Ct. Ala., 1983).....	6
Hicks v. State, 437 So.2d 1344 (Cr.App.Ala., 1982).....	5
Jones v. Barnes, ___ U.S. ___, 77 L.Ed.2d 987, 103 S.Ct. ___ (1983).....	4
Ross v. Moffitt, 417 U.S. 600, 41 L.Ed.2d 341, 94 S.Ct. 2437 (1974).....	5
Strickland v. Washington, ___ U.S. ___, 80 L.Ed.2d 674, 104 S.Ct. ___ (1984).....	3-6

REPLY ARGUMENT

This brief is filed in response to the Respondent's opposition memorandum.

A.

THE ALABAMA SUPREME COURT CONSTRUED THE UNITED STATES CONSTITUTION IN THIS CASE

The Alabama Supreme Court stated the issue before it as follows:

> "...Sturdivant asserts that he was denied the effective assistance of counsel because Blair failed to comply with the requirements of Anders v. California, 386 U.S. 738 (1967). In Anders, the Court addressed the 'extent of the duty of a court-appointed appellate counsel to prosecute a first appeal from a criminal conviction, after that attorney has conscientiously determined that there is no merit to the indigent's appeal.'..." See Appendix "B" to the Petition, page 6.

The Court then went on to state the facts in Anders and discuss the case generally. This Honorable Court's decision in Anders

was cited by the Alabama Supreme Court some five times. The State Supreme Court quoted Anders twice, once extensively. Appendix "B", pages 7 and 8-9. The Alabama Supreme Court based its holding on the following finding:

> "...In the case at bar, the requirements of Anders were not followed...." (Appendix "B", page 10).

The Alabama Supreme Court's holding read as follows:

> "...Accordingly, we have no option but to follow the mandate of the Anders opinion and, therefore, we must reverse the judgment of the Court of Criminal Appeals...." (Appendix "B", page 11)

On remand, the Court of Criminal Appeals ruled:

> "...The Supreme Court of Alabama has determined that the requirements of Anders v. California, 386 U.S. 738 (1967), were not followed in this case...." (Appendix "D", page 18)

What the Petitioner cannot understand is how learned Counsel can argue that the Alabama Supreme Court's decision was based on state, rather than federal Constitutional, law.

B.

THE APPLICABILITY OF STRICKLAND V. WASHINGTON

The Respondent argues that since Strickland v. Washington (___ U.S. ___, 80 L.Ed.2d 674, 104 S.Ct. ___ [1984]) involved trial, as opposed to appellate counsel, its standards do not apply to counsel on appeal. This issue is discussed at some length in the Petition at pages 21-27. On this point, the Petition concludes:

> "...[I]t cannot be argued that performance by appellate counsel which passes muster under the Sixth Amendment standards for trial counsel, would miss the mark of effective assistance of counsel on appeal...." (Petition, pages 26-27).

The fact is that this Honorable Court has never passed on the issue of the effective assistance of counsel in taking an appeal. This Court's decisions have only addressed the question of counsel's duties once an appeal is perfected: In a non-frivolous appeal counsel must file a brief (Anders v. California, 386 U.S. 738, 18 L.Ed.2d 493, 87 S.Ct. 1396 [1967]) but need not brief every non-frivolous issue (Jones v. Barnes, ___ U.S. ___, 77 L.Ed.2d 987, 103 S.Ct. ___ [1983]).

The point here is, as stated in the Petition, if the Strickland standards are appropriate at the trial level, where trial and trial counsel are expressly guaranteed by the Constitution, there is no logical way that a more stringent standard could be required on appeal.

C.

PREJUDICE

The Respondent argues that prejudice should be presumed from an attorney's not taking an appeal. There are two problems with this:

First, prejudice is not presumed from an attorney's acts or omissions. Strickland v. Washington, ___ U.S. ___, 80 L.Ed.2d 674, 104 S.Ct. ___ (1984).[1]

Second, error is not presumed in appeals, indeed the presumption is that of correctness. Ross v. Moffitt, 417 U.S. 600, 51 L.Ed.2d 341, 94 S.Ct. 2437 (1974);[2] Hicks v. State, 437 So.2d 1344

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1. "...The defendant must show that there is a reasonable probability that, but for counsel's professional errors, the result of the proceeding would have been different...." (80 L.Ed.2d 674, 698)

2. See the language quoted at pages 22-23 of the Petition.

(Cr.App.ala., 1982);[3] Aff'd 437 So.2d 1346 (S.Ct. Ala., 1983).

Of course, a defendant claiming prejudice from his attorney's improper[4] failure to appeal a conviction and having made a colorable claim of possible error, might well need a transcript or a portion thereof to meet his burden of showing prejudice. In such a case, a non-indigent could obtain a transcript, while one would be provided free to an indigent. However, the instant case is not such a case. Here neither the defendant nor his former attorney nor his new attorneys could suggest any possible

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3. See the brief digest at note 10, page 25, of the Petition.

4. Remember, prejudice is only one component of the Strickland standard. See 80 L.Ed.2d 674, 699.

error and the only evidence on the subject is that any appeal would have been frivolous.

CONCLUSION

In conclusion, the Petitioner State again respectfully submits that the decision and opinion of the Alabama Supreme Court in this case conflicts with the prior decisions of this Honorable Court on the respective rights and duties of convicted persons and their attorneys in the taking of appeals and on the standards for the effective assistance of counsel under the United States Constitution. For these reasons, the Petitioner again prays that this Honorable Court will issue the writ of certiorari and review the decisions and

opinions of the Honorable Appellate Courts of Alabama and on such review will reverse the decisions of said Courts to the extent that the same hold that the conduct of the attorney in this case violated the United States Constitution.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

I, Joseph G. L. Marston, III, an Assistant Attorney General of Alabama, a member of the Bar of the Supreme Court of the United States and one of the Attorneys for the State of Alabama, Petitioner, do hereby certify that on this ___ day of September, 1984, I did serve the requisite number of copies of the foregoing on the Attorneys* for Earnest James Sturdivant, Respondent, and a courtesy copy on his former attorney** by mailing same to them, first class postage prepaid and addressed as follows:

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